Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

BERNARD O'NEILL, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 15(a) provides in pertinent part that "a party may amend its pleading only with the opposing party's written consent or the court's leave' and that "[t]he court should freely give leave when justice so requires." The questions presented are:

1. Does F. R. Civ. P. 15(a) give a district court judge discretion to deny a motion to amend a complaint that is filed before the statute of limitations has run and approximately nine years before the case was scheduled to go to trial?

2. Are defendants prejudiced within the meaning of this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), where they had notice that they were going to be added as defendants approximately nine years before the case went to trial?

STATEMENT OF THE PARTIES TO THE PROCEEDINGS

Petitioner states, pursuant to Rule 14.1(b), that in addition to Bernard O'Neill, plaintiffs/petitioners in the court below included:

Linda A. O'Neill; Michael Coyle, a minor by and through his parent and natural guardian, Linda O'Neill; Kelly Coyle, a minor by and through her parent and natural guardian, Linda O'Neill; Delores Carmichael; Kathleen O'Neill; Kevin Williams, a minor by and through his parent and natural guardian, Linda O'Neill; D, Kelly O'Neill; Chad G. Brumbaugh.

In addition to the City of Philadelphia, the individual defendants are:

Police Commissioner Richard Neal; Detective Robert Ballentine; Detective Richard Bova; Detective Robison; Detective John Doe; Captain John Doe; Lieutenant Robert Morris; Lieutenant John Doe; Sergeant John Doe; Police Officers John Doe Nos. 1 through 50.

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. 2a-12a) is unpublished but can be found at 2008 U.S. App. LEXIS 16654. The Memorandum and Order of the district court denying Plaintiff's Motion to Amend the Complaint is unpublished, and attached hereto at App. 36a-38a; the Memorandum and Order of the district court denying Defendants' Motion for Summary Judgment as to Detectives Robison and Ballentine is unpublished, and attached hereto at App. 19a-35a; the Memorandum and Order of the district court granting Detectives Robison's and Ballentine's Motion for Reconsideration is unpublished, and attached hereto at App. 36a-38a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 4, 2008 (App. 2a-12a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 15(a) provides

> "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days

> after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; leave shall be freely given when justice so requires."

F. R. Civ. P. 15(a).

STATEMENT OF THE CASE

The Plaintiffs (Petitioners) filed a civil complaint on March 25, 1997 pursuant to 42 U.S.C. § 1983 alleging Fourth Amendment claims of illegal entry/illegal search and excessive force. Plaintiffs' Complaint was filed against Defendants City of Philadelphia, Commissioner Richard Neal, Detective Robert Ballentine, Detective Richard Bova, Detective Robison, Lieutenant Robert Morris and a Lieutenant John Doe, Sergeant John Doe and Police Officers John Doe #1-50.

The allegations in Plaintiffs' Complaint stemmed from three separate entries/searches of Plaintiff, Bernard O'Neill's residence at 2910 S. 61st Street in Philadelphia, Pennsylvania. Defendants (Respondents) had an arrest warrant for Jason O'Neill, Plaintiff Bernard O'Neill's stepson, who was wanted for three counts of murder by arson. The first two entries/searches of Bernard O'Neill's residence occurred on May 30, 1995 and June 12, 1995 and were conducted by named Defendants Detectives Ballentine and Robison along with uniformed officers from the 12th District and Federal Fugitive Task Force Agent Steve Shute. The November 23, 1995 entry/search occurred on Thanksgiving morning and did not involve any of the named Defendants, but

instead was executed by Detectives Permint and Quick, and involved uniformed members of the Stakeout Unit and the 12th District. It was the November 23, 1995 entry/search that involved the use of excessive force and prompted the Plaintiffs' to file an Internal Affairs complaint.

At the time of filing the Federal Complaint, Plaintiffs did not know the identities of the persons who had conducted the November 23, 1995 entry/search and accordingly listed a number of John Doe Defendants. On May 22, 1997, Defendants served Plaintiffs with Initial Disclosures, specifically identifying the Officers involved in the November incident. Plaintiffs filed a Motion to Amend the Complaint on July 25, 1997 to add as Defendants those Officers identified in the Defendants' Initial Disclosures as participating in the November 23, 1995 entry/search. Plaintiffs' Motion to Amend was filed before the Statute of Limitations had run on Plaintiffs' § 1983 claim against the newly named Defendants.

By Order dated August 8, 1997, the case was placed in civil suspense by the district court pending the resolution of the criminal proceedings against Jason O'Neill, who had been arrested in Florida. Before the Defendants could file a Response to Plaintiffs' Motion for Leave to Amend the Complaint, by Order dated August 12, 1997, Plaintiffs' Motion to Amend was "DENIED without prejudice to its renewal by letter application to the Court once the case is removed from suspense."

The case was removed from Civil Suspense on December 3, 2001. Settlement negotiations ensued, and a settlement agreement was reached. Accordingly, on March 17, 2003, pursuant to Local Rule 41.1(b), an Order was issued dismissing the action with prejudice. As part of the settlement, Defendants had agreed to return to the Plaintiffs certain personal items taken from Bernard O'Neill's residence, including a family Bible. Because the Defendants failed to comply with this aspect of the agreement, on June 16, 2003, the Court issued an Order allowing the Plaintiffs to inspect the personal belongings in the possession of the District Attorney's office and to identify what items were missing.

After the ordered inspection, by Order dated June 25, 2003, the case was reopened for the limited purpose of allowing the parties to resolve the dispute regarding the missing personal property and to finalize the settlement. The parties attempted to resolve the dispute and settle the matter, and towards that end, on November 9, 2004, the Court issued an Order to the Clerk of Quarter Sessions of Philadelphia County, requiring the Clerk to turn over to Bernard O'Neill the missing items.

Subsequent to the November 9, 2004 Order, the missing items were not turned over and accordingly the settlement agreement fell apart. By Order dated August 10, 2006, the Court sent notice that the case would be dismissed unless written application was submitted within thirty days. Plaintiffs' counsel submitted the required written application and shortly thereafter, on November 6, 2006, sent a letter to the Court renewing the Motion for Leave to Amend the Complaint. On the

same day, Defendants filed a Motion for Summary Judgment. Two days later, Defendants filed a Response to Plaintiffs' Motion for Leave to Amend the Complaint. Without giving the Plaintiffs a chance to Reply to Defendants' Response, by order dated November 15, 2006, the Court denied the Plaintiffs' Motion for Leave to Amend the Complaint to add the Officers involved in the November 23, 1995 incident. In denying the Motion, the Court held that it would work a substantial hardship on the Defendants. App. 37a.

On November 22, 2006, Plaintiff filed a Response to Defendants' Motion for Summary Judgment. By Order dated December 12, 2006, the Court granted Defendants' Motion as to Detective Bova because he had not participated in any of the entries/searches, and the City of Philadelphia, Commissioner Neal and Lieutenant Morris, and denied Defendants' Motion as to Defendants Ballentine and Robison regarding the Plaintiffs' illegal entry/search claims for the May and June 1995 incidents. In reaching its conclusion, the Court held that Defendants' Ballentine and Robison were not entitled to qualified immunity because "there [were] genuine issues of material fact as to whether Detectives Ballentine and Robison had a reasonable belief that Jason lived at 2910 S. 61st Street and whether Jason could be found at 2910 S. 61st Street on the days of the searches." App. 30a.

Defendants filed a Motion for Reconsideration on December 22, 2006. Without giving Plaintiffs the required fourteen days to Respond, by Order issued on January 4, 2007, the Court granted the Defendants' Motion for Reconsideration and dismissed the case.

Reviewing the same evidence that had been presented on Summary Judgment, the Court held that "[b]ased on [the] undisputed facts, I find that defendants Ballentine and Robison acted objectively reasonably when they searched Bernard O'Neill's house." App. 15a.

On January 15, 2007, Plaintiffs filed a Motion for Reconsideration or in the Alternative a Rule 60(b) Motion for Relief from Judgment. By Order dated January 16, 2007, the Court denied Plaintiffs' Motion and Plaintiffs filed a timely appeal to the Third Circuit Court of Appeals. In an unpublished decision, the Third Circuit affirmed the district court. On the issue of amending the complaint, the Third Circuit held that the district court did not abuse its discretion in denying the amendment because the delay in renewing the motion to amend prejudiced the defendants. App. 7a.

REASONS FOR GRANTING THE PETITION

This Court has written sparingly on Federal Rule of Civil Procedure 15(a). *See Foman v. Davis*, 371 U.S. 178 (1962). In *Foman*, this Court held that pursuant to Rule 15(a),

> "[i]n the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'."

Foman, 371 U.S. at 182. This Court's decision in *Foman* limits the district courts discretion to deny amendment to those circumstances where there is undue prejudice, delay or bad faith. *Id.* However, while this Court has articulated the proper standard to be employed by the lower courts in exercising their discretion, it has not addressed the circumstances constituting undue prejudice, delay or bad faith. This case raises two related issues that would permit this Court to clarify the meaning of the aforementioned terms, and their application in this case. First, pursuant to Rule 15(a) and this Court's decision in *Foman*, did the district court have the discretion to deny the Plaintiffs' Motion to Amend where it was filed before the statute of limitations had run and well before discovery had ended and the case was slated for trial.

Secondly, could the newly added defendants have been prejudiced, as the Third Circuit held, by the amendment where the Motion identifying them as defendants was filed approximately nine years before the case was scheduled for trial and hence they were on notice well before trial that they were potential defendants and the nature of the Plaintiffs claims against them. On this second issue, there is a conflict among the circuit courts of appeal that warrant this Court granting the Plaintiffs' Petition for Writ of Certiorari. The majority of the circuit court's that have addressed the issue have held that a delay in filing the motion to amend is insufficient to deny the right to amend absent a demonstration by the non-moving party of prejudice or bad faith. *Cornell & Co., Inc. v. Occupational Safety and Health Review Com.*, 573 F.2d 820, 823-24 (3d Cir.1978); *see also, Laber v. Harvey*, 438 F.3d 404, 426-

29 (4th Cir. 2006); *Harrison v. Rubin*, 174 F.3d 249, 252-53 (D.C. Cir. 1999); *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998); *Security Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234-35 (2d Cir. 1995); *United States v. Pend Orielle Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991). Other circuits focus on the length of the delay in filing the motion to amend, and if the delay is substantial, shift the burden to the moving party to justify the delay. *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979); *Andrx Pharms. Inc. v. Elan Corp.*, 421 F.3d 1227, 1237 (11th Cir. 2005). In a similar vein, the Tenth Circuit focuses primarily on the reasons given for the delay. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205-1206 (10th Cir. 2006).

I. The district court did not have the discretion to deny the amendments to the complaint.

It is generally understood that a district court has discretion to grant or deny a motion to amend a pleading. *Foman*, 371 U.S. at 182. However, in the context of Rule 15(a), this discretion is circumscribed, and limited, by the Rules liberal amendment policy and the well-established principle that cases should be decided on the merits and not dismissed because of technicalities. *Foman*, 371 U.S. at 181-82; *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938-39 (3d Cir. 1984). As the Third Circuit has recognized, in light of this Court's decision in *Foman*, Rule 15(a) creates a presumption in favor of amending, and it is the opposing

parties burden to demonstrate that the amendment would work a prejudice. *Boileau*, 730 F.2d at 938. Accordingly, absent a showing of bad faith or prejudice, under the Third Circuits reading of *Foman*, a district court does not have discretion to deny a motion to amend.

In this case, both the district court and the Third Circuit Court of Appeals focused on the date that Plaintiffs' counsel sent the court a letter requesting that the Motion to Amend the Complaint be renewed, as opposed to the date the Motion to Amend was actually filed, to determine whether the defendants were prejudiced. App. 7a, 37a. It is Petitioners' position that under the circumstances of this case, the lower courts erred in focusing on the date the Motion was renewed versus the date it was filed in analyzing the amendment issue, and that, when viewed from the date the Motion was filed, which was July 25, 1997, the district court did not have discretion to deny the Motion as there was no bad faith or prejudice.

At the outset, it should be noted that the district court's denial on November 15, 2006 of the Motion to Amend the Complaint precluded the Plaintiffs from proceeding on their best claim, which involved the November 23, 1995 search of the Plaintiffs' residence by a SWAT team. In this case, the Petitioners learned the identities of the officers involved in November 23, 1995 search through the defendants Rule 26 disclosures and shortly thereafter filed a Motion to Amend the Complaint to add those individuals as defendants. The Motion to Amend the Complaint was filed on July 25, 1997, well before the statute of limitations ran as to those

newly named officers, and well before the end of discovery. In short, the Petitioners complied with all of the Rules and took every step necessary to ensure that the Complaint would be amended and the officers involved in the November 23, 1995 incident added as defendants. Under these circumstances, the newly named defendants were given adequate notice in 1997 that they were being added to the lawsuit and the nature of the Plaintiffs' claims against them.

However, as detailed above, due to no fault of the Petitioners, the district court did not rule on the Motion to Amend the Complaint and instead put the case in civil suspense. The case was lifted from civil suspense on December 3, 2001, and serious settlement negotiations ensued. A settlement agreement was reached, and on March 17, 2003 an order was issued dismissing the case. Again, through no fault of Petitioners', the defendants were unable to comply with one of the terms of the settlement agreement—the return of Bernard O'Neill's family bible, and the district court issued a number of orders in an effort to compel compliance with the settlement agreement (the last order was November 9, 2004). During this period of time, the Petitioners were under the impression that they had an enforceable settlement agreement.

It wasn't until August 10, 2006, when the district court issued an order to Plaintiff requiring that the case move forward, that the Petitioners shifted gears from settlement mode to litigation mode. Following the jump-starting of the case, Petitioners sent the district court a letter renewing the Motion to Amend the Complaint. In light of the above circumstance, this is clearly not a

case where the plaintiffs delayed in filing a motion to amend the complaint. Indeed, the Petitioners filed the Motion to Amend shortly after receiving the Rule 26 disclosures identifying the officers involved in the November 23, 1995 incident. Nor is this a case where the newly named defendants were caught off guard, or not alerted to the fact that they were going to be named as defendants until late in the proceedings. By filing the Motion to Amend in 1997, the Petitioners put the newly named defendants on notice well before the end of discovery, and some nine years before any scheduled trial date, that they were being sued and the nature of Plaintiffs' claims against them.

Notwithstanding the fact that the Motion to Amend was filed in 1997, the Third Circuit analyzed the issue of prejudice as if the Motion had been filed in 2006, when the letter to renew the Motion was sent. Contrary to the Third Circuit's approach, under the circumstances of this case, the issue of prejudice should have been analyzed from the date the Petitioners filed the Motion to Amend and not the date the letter to renew the Motion was sent. Using the date the Petitioners actually filed the Motion to Amend, it is clear that in 1997 there was no prejudice or bad faith associated with the filing of the Motion. Accordingly, under this Court's decision in *Foman*, the district court would not have had discretion to deny the Petitioners Motion to Amend and committed and error in doing so.

2. There was no prejudice to the newly named defendants.

The Third Circuit denied the Petitioners' Motion to Amend the Complaint to replace the John Doe defendants with named individuals on the ground that the delay in filing the letter to renew the Motion caused prejudice to defendants. App. 7a. This Court has not defined the meaning of prejudice in the *Foman* standard. Moreover, as stated above, there is a conflict in the circuit courts as to what role delay plays in establishing prejudice under the *Foman* standard. Notwithstanding this conflict, the majority of the circuit courts, including the Third Circuit, have held that delay in filing the Motion to Amend is not sufficient, by itself, to constitute prejudice. (see cites above).

Instead, in order to establish prejudice, the non-moving party has the burden of demonstrating that the amendment to the pleading "would result in additional discovery, cost, and preparation to defend against new facts and new theories." *Cureton v. National Collegiate Athletic Ass'n.*, 252 F.3d 267, 273 (3d Cir. 2001); *Minter*, 451 F.3d at 1208 ("Courts typically find prejudice only when the amendment unfairly affects the defendants 'in terms of preparing their defense to the amendment.'"). In light of these concerns, the courts have recognized that "notice strongly mitigates against any claims of prejudice." *Wausau Underwriters Ins., Co.v. Shesler*, 190 F.R.D. 341 (E.D. Pa. 1999).

In the instant case, the newly named defendants had notice in 1997 that they were being sued and the nature of the claims against them. Petitioners' Complaint, and

proposed Amended Complaint, included as one of its causes of action the November 23, 1995 incident that the newly named defendants participated in. Moreover, prior to Petitioners filing the Complaint, the newly named defendants had been the subject of an internal affairs investigation regarding the November 23, 1995 incident, and also were listed on defendants Rule 26 disclosures as persons with knowledge of the incident.

Under these circumstances, adding the newly named defendants would not have required additional discovery, costs, or a change in legal strategy, as the Third Circuit suggested, because the factual allegations regarding the newly added defendants were contained in the original Complaint as well as the proposed Amended Complaint. All the Petitioners were seeking to do was replace the John Doe defendants in the original Complaint with named defendants.

Nor would the amendment have delayed the trial. Contrary to the Third Circuits suggestion, the case was not going to trial the day after the letter to renew the Motion to Amend was filed with the district court. The day after the Petitioners filed the letter to renew the Motion to Amend, the defendants filed a Motion for Summary Judgment. The district court was therefore required to resolve defendants' Motion before scheduling trial.

Accordingly, under this Court's decision in *Foman*, and the liberal amendment policy of Rule 15(a), defendants failed to demonstrate that they were prejudiced by Petitioners renewal of the Motion to Amend the Complaint and the Third Circuit erred in so holding.

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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